100

(3)

NO. 07-1533

FILED
JUL 22 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

YAAKOV KANOVSKY, ---- PETITIONER

MONTEFIORE MEDICAL CENTER and
FRANK VEITH, M.D. ---- RESPONDENTS

ON PETITION FOR A WRIT OF
CERTIORARI TO SUPREME COURT,
APPELLATE DIVISION, SECOND
DEPARTMENT NEW YORK

REPLY BRIEF

YAAKOV KANOVSKY

1138 52nd Street

Brooklyn, New York 11219

(718) 435-2847
Petitioner Pro Se

TABLE OF CONTENTS

HEADINGS PG No.

Brief Summary.....1

Respondent's Statement of the Case 2

Respondent's "Reasons for Denying the Petition".....3

REASONS FOR GRANTING THE PETITION.....4

CONCLUSION 6

TABLE OF AUTHORITIES CITED

CASES Pg No.

Echeverri v. Flushing Hosp. & Med. Center, 123 A.D.2d 818 (2nd Dept., 1986) 2

Rose v. La Joux, 93 A.D.2d 817 (2nd Dept., 1983)..... 2

Toth v. Community Hospital at Glen Cove, et al., 22 N.Y. 2d 255 5

Ward v. Kovacs, 55 AD2d 391..... 5

PETITIONER'S REPLY BRIEF

Brief Summary

First, in their Brief in Opposition, Respondents present a "Statement of the Case" so replete with mistakes and omissions that it bears little resemblance to the actual facts. Respondents omit crucial details like the fact that their summary motion was successive, and that Petitioner demonstrated that he was present on the day of the hearing and did not "fail to appear" as they allege.

Next, Respondents follow up with a similarly misleading section titled "Reasons for Denying the Petition" making the specious argument that Petitioner failed to pursue "several adequate post-deprivation remedies". This is both untrue, as most of these so-called unavailed remedies were either attempted or entirely futile, and irrelevant, as the procedural history of this case demonstrates.

Finally, Respondents come to the peculiar and logically circular conclusion that because Petitioner's original motion to vacate was denied, *ipso facto*, there was no violation of substantive due process. The gross procedural and legal defects in that very order are what characterize the very violations to Petitioner's substantive due process.

Respondent's Statement of the Case

In their statement of the case, Respondents state (pg1) that they moved for summary judgment and were granted same. They fail to remind This Court that this was a second attempt to move for summary judgment which in itself was prohibited under New York Law, unless new evidence was presented in the second motion which was previously unavailable and unless such evidence warrants granting summary judgment. See *Rose v. La Joux,* 93 A.D.2d 817 (2nd Dept., 1983) *and Echeverri v. Flushing Hosp. & Med. Center,* 123 A.D.2d 818 (2nd Dept., 1986). Respondents' Motion lacked either element.

Respondents Brief further states (pg1) that "it is undisputed that petitioner failed to appear for oral argument". That statement is misleading as Petitioner has adequately demonstrated that he was present in courthouse for the oral argument but was misdirected by Judge Garson's own staff as to where to appear. Regardless, Petitioner's alleged failure to appear has no relevance to this matter. It is undisputed that all subsequent orders in this matter have considered Judge Garson's order to have been on the merits. Furthermore, Petitioner's Brief to the Appellate Division Second Department carefully reviewed all case law on successive summary judgment and conclusively pointed out that no judge had the discretionary power to grant Respondents' motion. Petitioner further pointed

out that even, arguendo, if a judge could entertain a second motion for summary judgment, he would be precluded by law from granting same where genuine issues of material facts existed, as was shown in all of Petitioner's motions.

Finally, Respondents posit that the New York Court of Appeals dismissed Petitioner's appeal because the appeal taken was not from a final order, and attempt to raise a distinction between Judge Garson's order of summary judgment and Judge Ruditsky's order denying Petitioner's Motion to Vacate. This is a distinction without a difference as both orders are final determinations in the case.

Respondent's "Reasons for Denying the Petition"

Respondents essentially make the argument that Petitioner did not adequately exhaust his post-deprivation remedies. As is well-demonstrated in the torturous history of this case, Petitioner has made all reasonable efforts to have the erroneous summary judgment order vacated except where such attempt would have been futile. Respondents argue that Petitioner should have moved for reargument to the "same justice" who decided the motion (pg.2). Such a motion would have been futile, as Respondents are well aware that Judge Garson was removed from the bench for criminal indictments a few days after he issued his order.

Respondents question why Petitioner did not bring a renewal motion to introduce new evidence not presented in his prior opposition. Petitioner moved to vacate because his evidence was not new, rather it had been presented and utterly ignored by Judge Garson.

Respondents, who construe the petition for a writ as merely a procedural motion, misunderstand the very nature of Petitioner's complaint before This Court. Petitioner's complaint before This Court is that both the lower court and the Appellate Division consciously disregarded the clear precise law governing both successive summary judgment and the judicial right to grant summary judgment. All of Petitioners papers spoke not only to a possible default order, but to the very merits of Petitioner's claim and the judicial response to same. No issue was left in doubt or unappealed. Thus, to suggest that Petitioner has additional remedies before either of those judicial bodies is disingenuous at best.

Reasons For Granting Petition

Both the original summary judgment order and the order denying the motion to vacate made gross errors of law and procedure. Respondents' main points in opposing Petitioner's initial Cross-Motion never included any case law or statute which permitted them to bring the summary judgment motion, but focused on denigrating the

expertise of Dr. Chaffiian, and denying that Dr. Friedland, a podiatric surgeon, could testify in this matter. Petitioner pointed out that the seminal cases by both the New York Court of Appeals in *Toth v. Community Hospital at Glen Cove, et al.*, 22 N.Y. 2d 255, and by the Second Department in *Ward v. Kovacs, 55 AD2d* 391, conclusively showed the following: a) an expert's affidavit of merit was unnecessary where the issues sworn to by Petitioner, i.e. the grotesque closing and shaping of the stump which caused Petitioner intense continuous pain and led directly to a second episode of gangrene, and the doctor's failure to investigate even after constant complaints by Petitioner, did not require expert testimony, as any lay person could understand the underlying negligence, and thus, Petitioner's sworn affidavits were sufficient in and of themselves; and b) a treating physician, even if he characterizes himself a non-expert, is fully qualified to testify as an expert at trial, and is certainly qualified for the lesser standard of defeating a summary judgment motion.

Finally, Respondents argue that the New York Supreme Court decision denying Petitioner's motion to vacate conclusively prove there was no violation of substantive due process. This argument is entirely circular, and utterly ignores the substance of Petitioner's writ. The order denying Petitioner's motion to vacate, like the order granting summary judgment, ignored well-settled

principles of New York law on successive summary judgment motions, and completely disregarded genuine, disputed issues of material fact which should have precluded any grant of summary judgment and mandated the vacatur sought.

CONCLUSION

Thus, for all the reasons stated in Petitioner's Writ, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Yaakov Kanovsky
Petitioner Pro-Se
1138 52nd Street
Brooklyn, New York 11219
(718) 435-2847

Dated: Brooklyn, New York
July 20, 2008